

Moz

STATE OF NORTH CAROLINA *FILED*

WAKE COUNTY

2015 AUG 30 PM 4:00

WAKE COUNTY, N.C.

Common Cause; *et al*

BY
Plaintiffs,

v.

Representative David R. Lewis, in his official capacity as senior chairman of the House Select Committee on Redistricting, *et al*

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

REPUBLICAN NATIONAL COMMITTEE'S MOTION FOR LEAVE TO APPEAR FOR A LIMITED PURPOSE TO PROTECT ITS CONFIDENTIAL AND PRIVILEGED INFORMATION UNDER RULE 45

The Republican National Committee (“RNC”) moves under Rule 45 of the North Carolina Rules of Civil Procedure to take essentially the same actions as the Court previously allowed Geographic Strategies to take to protect certain information that belongs to the RNC. Specifically, the RNC requests that the court allow it to: (1) appear for the limited purpose of requesting a protective order; (2) maintain the “CONFIDENTIAL” designation with respect to any potential RNC documents contained within the Hofeller Files for an additional sixty (60) days; and (3) to the extent necessary, allow the RNC to review the RNC documents contained within the Hofeller Files and itemize files in which the RNC claims ownership or asserts any other claim of right.

The RNC is the national political committee for the Republican Party. The RNC manages the Republican Party’s business at the national level, supports Republican candidates and state parties, coordinates fundraising and election strategy, and develops and promotes the national Republican Party platform. From 2011 until July 2018, Geographic Strategies LLC (“Geographic Strategies”) performed consulting work for the RNC with respect to redistricting issues across the country.

Geographic Strategies filed a motion asking the Court to protect its confidential information under the Consent Protective Order. On July 12, 2019, the Court granted this request in part, allowing Geographic Strategies forty-nine days to review and assert ownership interests in the Hofeller Files. During its review of the Hofeller Files, Geographic Strategies determined that a number of the files are likely the property of the RNC. *See Ex. A.* Geographic Strategies also determined that many of these files may implicate the RNC’s attorney-client privilege, attorney work product, or First Amendment privilege. *See id.* The vast majority of the RNC files should be deemed CONFIDENTIAL and/or privileged pursuant to Geographic Strategies’ request. However, it is possible that Geographic Strategies cannot make a claim of ownership for some RNC documents that are or could be considered privileged or confidential. To the extent any such files are deemed beyond the scope of Geographic Strategies’ proprietary interests and are not otherwise marked “CONFIDENTIAL,” the RNC hereby seeks leave to review such files as identified by Geographic Strategies to make its own claims of ownership or assert other claims of right.

BACKGROUND

The circumstances under which Plaintiffs obtained the Hofeller Files have been described at length by the Legislative Defendants, *see Leg. Defs’ 6/17/2019 Resp. to Mot. for Direction.* Importantly, like Geographic Strategies, the RNC did not receive notice from Plaintiffs that Stephanie Hofeller had produced files pursuant to a third-party subpoena. Thus, like Geographic Strategies, the RNC had no opportunity to object, review the documents for privilege, or designate documents under the Consent Protective Order.

The RNC first began to suspect that some portion of the Hofeller Files might implicate its proprietary rights and/or privileges in May 2019, when press stories reported on the “trove” of

documents introduced in this Court. *See, e.g.*, Mark Joseph Stern, *The New Trove of Secret Gerrymandering Files Will Be a Nightmare for the GOP*, SLATE (May 31, 2019, 5:22 P.M.), <https://slate.com/news-and-politics/2019/05/thomas-hofeller-secret-gerrymandering-files-north-carolina.html>. On May 28, 2019, the RNC informed Plaintiffs by letter that the Hofeller Files likely contained “privileged and proprietary information concerning Dr. Hofeller’s work for and on behalf of the RNC.” *See Ex. B.* As a result, the RNC requested, among other things, that Plaintiffs “cease reviewing the entirety of the materials produced by [Stephanie] Hofeller” and “return the entirety of the produced materials to the Estate of Dr. Hofeller to permit a proper privilege review of Dr. Hofeller’s documents before a production is made.” *See id.*¹

Plaintiffs refused the RNC’s request. In a June 4, 2019 response, Plaintiffs rejected the notion that the RNC could make any claims of ownership or privilege at that time because it had not identified specific documents. *See Ex. C.* The RNC had not—and to this day still has not—seen the Hofeller Files to make such specific claims. And contrary to the arguments Plaintiffs made in their response, the fact that RNC’s counsel at the time also represented the Legislative Defendants did not mean the RNC itself had—or should have had—access to the Files or any file index. Moreover, Plaintiffs represented that “much of the information on these devices is directly relevant to North Carolina redistricting.” *See id.* Ultimately, however, Plaintiffs only used *four documents* out of the nearly a terabyte of data produced by Stephanie Hofeller.

Further, on May 31, 2019, the Legislative Defendants designated the entirety of the Hofeller Files “HIGHLY CONFIDENTIAL” under the Consent Protective Order. *See Ex. D.* As a result, the RNC could not review the Files or file indexes. And because Legislative Defendants

¹ None of the Hofeller Files that have become public or were used at trial in this case were RNC documents.

were on the brink of a two-week trial, they were in no position to review the nearly terabyte of data that had been produced—nearly almost all of which was entirely unrelated to this litigation—and notify the RNC regarding the extent to which its documents appeared in the Hofeller Files.

On June 15, 2019, Geographic Strategies moved to designate the entirety of the Hofeller Files HIGHLY CONFIDENTIAL. In its July 15 Order, this Court granted Geographic Strategies' request under North Carolina Rule 45 to appear for the limited purpose of requesting a protective order. The Court designated the entirety of the Hofeller Files—minus the 35 North-Carolina-related documents identified by Plaintiffs as potentially relevant to the trial—“CONFIDENTIAL” for a period of sixty days, and provided Geographic Strategies with the opportunity to review the Hofeller Files and itemize those over which it claimed ownership or another claim of right. Pursuant to that order, the Hofeller Files remain “CONFIDENTIAL” until September 10, 2019. As a result, the RNC, consistent with the Consent Protective Order, has still not reviewed the Hofeller Files or any file index.

From 2011 until July 2018, Geographic Strategies performed consulting services for the RNC with respect to redistricting. *See* 7/1/2019 Geographic Strategies' Reply, Oldham Aff. ¶ 3 & Ex. A. Pursuant to a contract with the RNC, work performed by Geographic Strategies for the RNC is both privileged and the property of the RNC. *See* Ex. E. On August 26, after completing its review of the Hofeller Files, Geographic Strategies' counsel informed the RNC by letter that, while it could not share or disclose the nature of any specific files under the terms of the Consent Protective Order, a portion of the files appeared to be the property of the RNC and could implicate RNC privilege issues. *See* Ex. A. In other words, for the first time, the RNC had some confirmation of what it feared: that the Hofeller Files contain proprietary and/or privileged RNC documents.

It is entirely possible, and the RNC believes, that Geographic Strategies' claims of ownership or privilege over documents identified in the Hofeller Files will fully cover most of its documents given its relationship to Geographic Strategies. However, the RNC also understands that Geographic Strategies does not own a portion of the Hofeller Files that contain RNC documents. Therefore, to ensure that no RNC confidential or privileged files become public after the current "CONFIDENTIAL" designation expires on September 10, 2019, the RNC files this motion seeking an opportunity to make its own claims of ownership or other claims of right, as may be necessary to protect its interests in any documents Geographic Strategies is unable to protect.

ARGUMENT

The Court should grant the RNC leave under Rule 45 of the North Carolina Rules of Civil Procedure to appear for the limited purpose of designating files owned by the RNC or in which the RNC holds a privilege as "CONFIDENTIAL" under the Consent Protective Order. Rule 45 authorizes this Court to allow a third party "affected by" a "subpoena requir[ing] disclosure of a trade secret or other confidential research, development, or commercial information" to appear in order to protect its confidential information. N.C.G.A. § 1A-1, Rule 45(c)(7). The Court exercised this power when it granted Geographic Strategies' request to protect its confidential information. The Court should grant the same relief to the RNC now that it has been informed by Geographic Strategies that the Hofeller Files contain documents over which the RNC likely has claims of ownership, confidentiality, and privilege, but that Geographic Strategies may be unable to protect.

The RNC now has "a good faith claim of need of protection from disclosure," Consent Protective Order, ¶ 2, with respect to RNC documents within the Hofeller Files. Indeed, the RNC

believes that many, if not all, of the documents referenced by Geographic Strategies are protected by confidentiality clauses in its contract with Geographic Strategies. *See* Ex. E.

The RNC also believes that many of its documents are likely protected by the attorney-client privilege or work product doctrine and, perhaps more significantly, the First Amendment privilege. *See, e.g., Democratic Nat'l Comm. v. Arizona Sec'y of State's Office*, No. CV-16-01065-PHX-DLR, 2017 WL 3149914, at *2 (D. Ariz. July 25, 2017) (the court “had no trouble concluding that Plaintiffs” established the first prong of the First Amendment Privilege with respect to “documents [that] provide[d] a detailed account of [the Arizona Democratic Party]’s election monitoring activities, including the location of precincts that it was targeting, the types of issues that it found most concerning, and its strategies in responding to incidents reported, including legal strategies” and “communications with strategic partners regarding strategy and analysis of voter demographics and likely voting behavior”) (citations and internal quotations omitted).

The RNC does not seek to review the entirety of the Hofeller Files. The RNC understands that Geographic Strategies has already conducted a detailed itemization of the Hofeller Files. The RNC is under the impression that as part of that review, Geographic Strategies identified documents in which it believed the RNC has an ownership or privilege interest. Thus, the RNC requests only that, to the extent necessary, the Court order Geographic Strategies to provide the RNC access to any files or documents it has identified as RNC files that are not deemed by this Court to be permanently “CONFIDENTIAL” based on Geographic Strategies’ claims so that the RNC can review and itemize that limited set of documents consistent with this Court’s July 15 Order. The RNC further requests that any such files continue to be designated “CONFIDENTIAL” for sixty (60) days while the RNC conducts its review. Granting this request would facilitate an expedient review by the RNC, thereby saving the parties—and this Court—valuable time and

resources. It would also protect the privileges of any other entities whose documents might be included in the Hofeller Files.

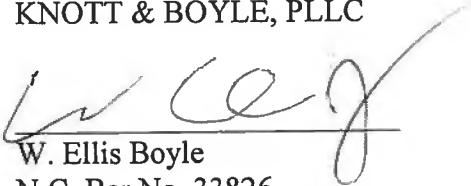
CONCLUSION

For the foregoing reasons, the RNC's motion should be granted in its entirety.

Respectfully submitted,

Dated: August 30, 2019

KNOTT & BOYLE, PLLC



W. Ellis Boyle
N.C. Bar No. 33826
4800 Six Forks Road, Suite 100
Raleigh, NC 27609
Telephone: (919) 783-5900
Email: ellis@knottboyle.com
Counsel for the RNC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing upon all parties to this matter by placing a copy in the United States Mail, First Class, postage prepared and addressed as follows:

Edwin M. Speas, Jr.
Caroline P. Mackie
Poyner Spruill LLP
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601
espeas@poynerspruill.com
cmackie@poynerspruill.com

Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs

R. Stanton Jones
David P. Gersch
Elisabeth S. Theodore
Daniel F. Jacobson
Arnold and Porter Kaye Scholer LLP
601 Massachusetts Ave., N.W.
Washington, D.C. 20001-3743
stanton.jones@arnoldporter.com
david.gersch@arnoldporter.com
elisabeth.theodore@arnoldporter.com
daniel.jacobson@arnoldporter.com

Counsel for Common Cause and the Individual Plaintiffs

Marc E. Elias
Aria C. Branch
Abba Khanna
Perkins Coie LLP
700 13th Street, N.W.
Washington, D.C. 20005-3960
MElias@perkinscoie.com
ABranch@perkinscoie.com
AKhanna@perkinscoie.com

Counsel for Common Cause and the Individual Plaintiffs

Amar Majmundar
Stephanie A. Brennan
Paul M. Cox
NC Department of Justice
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
amajmundar@ncdoj.gov
sbrennan@ncdoj.gov
pcox@ncdoj.gov

Counsel for the State Board of Elections and Ethics Enforcement and its members

John E. Branch III
Andrew D. Brown
Nathaniel J. Pencock
H. Denton Worrell
Shanahan Law Group, PLLC
128 E. Hargett St., Suite 300
Raleigh, NC 27601
jbranch@shanahanlawgroup.com
abrown@shanahanlawgroup.com
dworrell@shanahanlawgroup.com
npencook@shanahanlawgroup.com

Counsel for the Defendant-Intervenors

Thomas A. Farr
Phillip J. Strach
Michael McKnight
Alyssa Riggins
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Rd., Suite 1100
Raleigh, NC 27609
Thomas.farr@ogletree.com
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Alyssa.riggins@ogletree.com

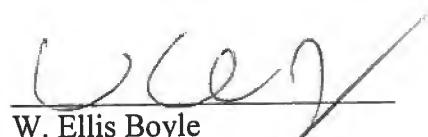
Counsel for Legislative Defendants

E. Mark Braden
Richard B. Raile
Trevor M. Stanley
Elizabeth Scully
Katherine McKnight
Baker & Hostetler, LLP
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036-5403
rraile@bakerlaw.com
mbraden@bakerlaw.com
tstanley@bakerlaw.com
escully@bakerlaw.com
kmcknight@bakerlaw.com
Counsel for the Legislative Defendants

Robert Neal Hunter, Jr.
Higgins Benjamin, PLLC
101 W. Friendly Ave., Suite 500
Greensboro, North Carolina 27401
rnhunterjr@greensborolaw.com
Counsel for Geographic Strategies, LLC

Dated: August 30, 2019

KNOTT & BOYLE, PLLC



W. Ellis Boyle
N.C. Bar No. 33826
4800 Six Forks Road, Suite 100
Raleigh, NC 27609
Telephone: (919) 783-5900
Email: ellis@knottboyle.com
Counsel for the RNC